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NEW TRIAL AT THE COMMON LAW[1]

To one who is accustomed to the practice of the courts of Ontario, based as it is upon the English practice, the granting of a new trial in an American court by the trial judge seems odd. In Ontario, the trial judge has no such power; a new trial, if granted at all, must be granted by the Appellate Division.

It is proposed in this article to examine into the question of what it the proper forum for an application for such relief at the common law.

We need not trouble ourselves with the ancient inferior courts. It is plain that the courts on this side of the Atlantic have had their eyes on the Superior courts as their exemplar, and especially the court of King's Bench.

Let us first speak of civil cases. In an action in either of the Superior or King's courts, the pleadings having been duly made and the matter at issue, preparation was made for trial by jury. Such trial might, in special cases, be had at Bar before all of the judges of the court in which the action was brought. This was the practice in early times in all cases except those of trifling importance, which might go to the justices in Eyre. The justices in Eyre seem to have not only tried the cases, but also to have given judgment in them, and, thus, they relieved the courts at Westminster of much of their labour. Sometimes, indeed, there was "no business before the bench at Westminster if an Eyre had been proclaimed in all the counties."[2]

[1] On a recent visit to an American University, Yale, where I had the honour of delivering the graduation address before the Faculty of Law, a discussion arose concerning the practice of the American trial judge granting a new trial. In this discussion judges and law professors took part, and one gentleman of very high standing charged ("half in fun and whole in earnest") our Ontario courts with having deviated from the common law in denying the trial judge the right to grant a new trial. I repelled the charge as vigorously as I could, but failed to convince my American friends. This article and its successor are the result of that international discussion.

[2] See Pollock and Maitland, *History of English Law,* Vol. I, p. 180. As the Statutes about to be mentioned fixed the practice, I do not go into the curious and complicated question of the appointment, function and powers of the justices in Eyre, doubtful and uncertain as they are in several respects.

In 1285 the practice which theretofore had apparently not been uniform was fixed for the two courts of King's Bench and Common Bench[3] by the Statute of Westminster, 2nd. 13 Edw. 1, c. 30. Section 1 provided that, thereafter, two justices should be assigned, before whom and none other, Assizes of Novel Disseisin, Mort d'ancestor and Attaints should be taken, and that they should associate with them one or two of the discreetest Knights of the Shire, and take the Assizes and Attaints not more than three times in the year. These justices of both Benches were empowered also to determine inquisitions of trespass "except the Trespass be so heinous that it should require great examination"; and also inquisition of other pleas "wherein small examination is required." "But Inquisition of many and great Articles the which require great Examination, shall be taken before the Justices of the Bench except that both Parties desire that the Inquisition may be taken before some of the Associates when they do come into those Parts so that henceforth it shall not be done but by two Justices or one with some Knight of the Shire upon whom the Parties can agree." Section II provided that when such "Inquests (inquisitions) be taken they shall be returned into the Bench, and there shall judgment be given and there they shall be enrolled."

This statute enabled parties to actions in either Bench to have their cases tried at a convenient place, and relieved juries from the trouble and expense of travelling up to Westminster or elsewhere out of their own county.

A subsequent statute also made at Westminster in 1299, 27 Edw. I, st. I, c. 4 (as explained by the Act of 1318, 12 Edw. II, c. 3) allowed "Inquests and Recognizances to be taken before any one Justice of the Court from which the issue came, accompanied by some Knight of the Shire . . . if they have not great need of great examination" ("si les enquests ne fuissent de grant examinement"). The Nisi Prius system was perfected in 1340, when the statute 14 Edw. III, st. I, was passed which provided for a judge of either Bench taking any inquest of Nisi Prius in either Bench (whether his own or the other court). The Chief Baron of the Exchequer, "if he be a Man of the Law,"

[3] The practice in the King's Bench and the Common Pleas were provided for by this statute, but not the court of Exchequer; we shall see how records in this court came to be tried in the same way as those in the two Benches.

(s'il soit homme de ley) was given the same power. "But in case that none of the Justices of one Bench nor the other nor the Chief Baron of the Exchequer being a Man of the Law do not come into the Inquests and Juries be or shall be taken by the Nisi Prius, the the Nisi Prius shall be granted before the Justices assigned to take Assizes in these parts, so always that one of the Justices assigned be justice of one Bench or the other or the King's Serjeant sworn."

Since the Act of Westminster 2nd. (whatever may have been the case before) by far the greater numbes of civil cases have been tried at Nisi Prius. In the older practice, ejectment might be and generally was tried at Bar, and also cases "requiring great examination"; but in time ejectment came to be sent down to Nisi Prius. What cases should be tried at Bar was always a question for the court, except that in cases to which the Crown was a party the Attorney-General was considered to have the right to such a trial; if a judge of either Bench or a master in Chancery was a party to an action, he was generally allowed a trial at Bar, while a gentleman at the bar was seldom refused the same privilege; but mere consent of the parties was not sufficient. The practice, then, was to send two judges to each Shire town at which place trials were to be had. These judges usually had five commissions, *i. e.*, commissions of the Peace, of Oyer and Terminer and of General Goal Delivery (which we shall speak of again); also of Assize and lastly of Nisi Prius. The commission of Assize enabled the commissioners to try certain kinds of action concerning land; and that of Nisi Prius "all questions of fact issuing out of the courts of Westminster that are then ripe for trial by jury."[4]

In the commissions one or more serjeants were usually named who sometimes took the place of a judge at the trial, and it was the universal custom to issue writs of Association whereby some person named, *e. g.*, the clerk of Assize, and other officers were associated, at least in form, with the judges; also writs of *si non omnes* permitting the execution of the commission, even if some of the commissioners should be absent, with the proviso that a judge or a serjeant (*i. e.*, one of the *quorum*) should be one of those present.

There were all sorts of technicalities in connection with the commissions: *e. g.*, they must be read on the very day named

[4] See Blackstone, Vol. III, p. 59.

(*i. e.*, the first day of the Assizes[5]) in the presence of one of the *quorum* commissioners.[6]

It was unusual for one judge to take the civil cases and the other the criminal business; in either case a serjeant at law sometimes occupied the bench. The authority of the presiding judge was not derived from his position as judge, but from his commission.[7]

The action being at issue, the court at Westminster ordered a *venire facias*[8] directing the sheriff to call a jury of twelve free and lawful men, and the case was ready for trial at Bar. In the earlier period an out of town case was continued from term to term to allow the justices in Eyre to get around to the county in which it was desired to try the case, and the order was for its trial at Westminster "nisi justiciarii itinerantes prius venerint ad partes illas." (This clause gave the name to the "Nisi Prius" proceedings and courts.) But when the Statute of Westminster 2nd. directed trials before justices of Nisi Prius in the county, with a provision that the inquests were to be removed into the bench, and that judgment should be given in the bench, and not at the place and court of trial, all power was taken away from the trial court to do anything but try the issue sent to be tried,[9] and to report the result. Accordingly the *nisi prius* clause was dropped from the order of continuance and inserted in the *venire facias* with the result that the jurors were to be summoned

[5] Within living memory, the first day of the sittings was known as "Commission Day" in Upper Canada, and it was not supposed that anyone would be forced to trial on that day. Alas! "Old times are changed, old manners gone," neither judge nor counsel has now any regard for "Commission Day" and anyone who should think to invoke the good old custom would be made the subject of rude jesting, if not told sharply, "Get on and don't waste time."

[6] This was rectified by the Act of 1833, 3 Geo. IV. c. 10, which allowed the opening and reading of the commissions to be effected on the day following Commission Day, etc.

[7] As we have just seen, he might not be a judge at all—he might be merely a serjeant-at-law.

[8] Originally the sheriff called a jury for each case, but the Act of 3 Geo. II, c. 25, directed that he should return only one panel for the trial of all causes (to consist of not less than forty-eight, nor more than seventy-two) without the particular order of the judges who took the circuit.

[9] It was even long doubtful whether the judge at Nisi Prius could receive a non-pros. *Greeves v. Rolls*, 2 Salk. 456; *cf.* 12 Mod. 651, 1 Burr. 359.

to Westminster on the day named, unless before (*nisi prius*) that day the assize judges should come into the county.

The sheriff accordingly summoned the jurors for the sittings of the justices of Assize.

The record was made up at Westminster and entered with the proper officer at the assize town that it might be tried in its proper order: the case was called, the record handed to the judge, the jury called and sworn, evidence adduced, a verdict had, general or special as the case might be, and the trial at Nisi Prius was over. The Statute of Westminster 2nd., as we have seen, requires by Sec. II, that the inquest must be returned to the court whence the record came. The result, then, of the trial in the form of a *postea* was made on the record for this purpose.

But once the trial was over and the *postea* entered, the Nisi Prius judge was *functus officio,* his commission *quoad* that case was exhausted, and all thereafter must be done by the court from which the record came.[10]

If the trial was considered unsatisfactory, an application could not be made to the Nisi Prius judge but must be made to the court. As Mr. Justice Lush says in *Balmforth v. Pledge* (1866) L.R. 1. Q.B. 427 at page 431, (speaking of judges acting as commissioners of Assize) "they try the cause but beyond the trial all jurisdiction as to new trial, etc., remains vested in that Court out of which the writ issued."

The complaining party might have a writ of Attaint for the inquiry by twenty-four jurors, as to whether the jury of twelve had given a false verdict.[11] But this prcatice, most unsatis-

[10] So far we have been speaking of records from the two Benches only. But it must not be forgotten that there was a third superior court, the court of Exchequer, which had a common law side and which acquired jurisdiction by the *quo minus* fiction, in the same way as the court of King's Bench by a similar fiction, *ac etiam.* The Statute of Westminster, 2nd., not providing for actions in the court of Exchequer being tried at Nisi Prius, a particular commission was issued to the Assize judges to try such actions. See Buller, *Nisi Prius,* p. 304.

[11] The curious may like to see the form of a writ of attaint. I copy one from Fitzherbert, *Natura Brevium,* ed. of 1730, at page 241:

"Si E. de L. Fec' te secur', &c., tunc summon', &c., 24. legal' milites de visn' de N. quod sint coram nobis, apud B. in octavis S. Hill parati sacrament' recognosc' si jurator' per quos quaedem inquisitio nuper capta fuit coram nobis apud B. per breve nostrum inter I. & M. ux' ejus & praed' S. de quadam transgressione eidem M. per praef' K. illata, ut dicit', falsum fec' sacram', sicut idem S. nobis gravit' conqueren' monstrav'

factory in every way, died out by the beginning of the seventeenth century, and was formally abolished by 6 Geo. IV. c. 50, in 1836. The real remedy given for a wrong verdict was a new trial.

It does not seem that the justices in Eyre ever granted a new trial; but certainly as early as the reign of Edward III, the court *in banc* granted a *venire de novo* in cases of misconduct on the part of the jury.[12]

& interim diligen' inquiras, qui fuer' juratores primae inquisitionis &c. eos tunc habeas coram praef.' Justic' &c. vel coram nobis, &c."

By 1757 Lord Mansfield could say, "The Writ of Attaint is now a mere sound in every case; in many it does not pretend to be a remedy." *Bright v. Eynon,* 1 Burr. 391, at page 393.

In *Wendell v. Safford,* 1841, 12 N. H. 171, at pages 175, 176, Gilchrist, J., gives some account of this proceeding and said: "few if any instances of an Attaint are to be found in the books subsequent to the case of *Brook v. Montague,* Cro. Jac. 90, which was decided in the year 1606."

The Year Books are full of cases of Attaint, many of them mentioned in the marginal and foot notes to Fitzherbert, *Natura Brevium,* 241-253. See also *Reg. v. Ingersall,* Cro. Eliz. 309; *Ayliffe v. Platt,* Dyer, 81 b; *Cawston v. Cawston,* Dyer, 141 a; *Rythe v. Kemp,* Dyer, 193 b; *Austen v. Baker,* Dyer, 201 b; (do not lay down old Dyer without reading Brooke, otherwise *Cobham's case,* Dyer, 241 b); 1 Co. *Inst.* 355 b; 2 Co. *Inst.* 130, 237; 3 *do.* 164, *Priddle & Napper's case,* 11 Co. R. 8 a, 13 a; *Huddy v. Fisher,* 1 Leon. 278, 279; Booth, *Real Actions,* 2d. ed. (1811), pp. 255-257; Rastall, *Entries,* 86-89, 92; Brooke, *Abridgment, sub. tit.* Attaint.

Notwithstanding that the writ of Attaint became effective many years before, a traveller in Upper Canada in the closing years of the 18th. century marked with astonishment that "one Advocate from England of some authority" (no doubt John White, the first Attorney-General of Upper Canada) insinuated to a jury that he would bring a writ of Attaint against them if they found against his client in the case in which he was addressing them. See my *Legal Profession in Upper Canada in Early Periods,* p. 183.

I cannot find that the writ of Attaint was ever used on this side of the Atlantic.

[12] The first reported case was in Michaelmas Term, 24 Edward III (1350). It is given very briefly in the Year Book, "Le Second Part de les Reports des Cases en Ley Puissant Prince, Roy Edward le Tierce," London, 1679, at page 33, as pl. 24; but it will be found at greater length in that extraordinary compendium of black-letter law "La Graunde Abridgement per le Judge tresreuerend Sir Robert Brooke, Chiualer, nadgairs Chiefe Justice del common Banke," 1586, *sub voc.* "Verdict" at No. 17.

At a trial at Nisi Prius in Essex the jury was sworn and committed to the charge of the sheriff. When they were ready to deliver their

By the time of the Commonwealth (and it is not unlikely as a part of the general improvement in law during the time of the Commonwealth) the practice was extended to cases of excessive damages, verdict against evidence and the like. The Common Pleas had the practice for a time of granting a new trial upon the certificate of the trial judge that the verdict was against his opinion; but that practice never prevailed in the King's Bench or so far as is known in the Exchequer.[13]

At first it was considered that all matter to be relied upon in a motion for a new trial must be entered upon the *postea;*[14] but before long, the facts were allowed to be proved by affidavit.[15]

verdict it was brought to the attention of the court that the bailiff (*"subvic.*) had permitted them to be at large and to eat and drink. The court refused to accept the verdict. Complaint being made to the King and the justices of his Bench being directed to do justice, they awarded a capias against the bailiff and a "nouel ven. fac." between the parties. A similar case is found in Mich. Term, 14 Hen. VII, pl. 3 (not 1, as both Blackstone and Brooke have it, unless, indeed, by 1 is meant page 1), where the Term Book says "per cet' misdemeanor des Jurors le vdict fuit void. Et ag(ard) novel Venire fac." The other case mentioned by Blackstone, Bk. III, p. 387, was 11 Henry IV, pl. 18; Brooke, *Enquest,* 75; the plaintiff gave a paper to a juror who was then sworn and showed it to his "compaignions" in the jury room; they found for the plaintiff, but the bailiff who had been in charge of the jury informed the court and it was held that though the paper was evidence it had not been delivered to the jury by the court and was not properly before them. A ven. fac. de novo was granted. In the case of *Goodman v. Cotherington* (Mich. Term, 16 Car. II, 1 Sid. 235), it is said that in *Mr. Shandes' case* in the time of Chief Justice Rolle a new trial was granted after a trial at bar "quia le plaintiff ad deliver un paper al jurors apres que ils depart del Barr."

[13] Blackstone, *Comm.*, Book III, p. 388.

The first case of new trial on the ground of excessive damages was in the Upper Bench, "Aug. Banc Republicae" in Mich. Term, 1655; *Wood v. Gunston,* Style, 466—the defendant had called the plaintiff "traytor" and the verdict passed for £1500 (equivalent to about $50,000 now) on a trial at Bar, the celebrated Serjeant Maynard argued in vain "that after a verdict the partiality of the jury ought not to be questioned nor is there any presidents for it in our books of the law, etc., etc."; "Windham on the other side pressed for a new tryal and said it was a packed business else there could not have been so great damages" and the Court *per* Glyn, Chief Justice, ordered "let there be a new trial the next term and the defendant shall pay full costs and judgment to be upon this verdict to stand for security to pay what shall be recovered on the next verdict."

[14] *E. g.*, in *Heylor v. Hall* (Mich. Term, 30 Jac. 1), Palmer, 325, it was admitted on argument by Serjeant Hitcham "Si tiel matter happen al

After a trial at Bar there was, for a long time, an objection to granting a new trial, but that soon disappeared and the same rules soon governed trials at Bar as trials at Nisi Prius.[16]

Nisi Prius, la les Justices doent ceo certifer de record sur le Postea al jour en B(anc)"; but contended that no record was necessary in trials at Bar "quia in mesme Court & tout qu' est fait in Court m. est in ceur de Justices p. cest terme." The court decided against this latter contention. See also *Graves v. Short* (Mich. Term, 40 & 41 Eliz.) Cro. Eliz. 616, where the court of Queen's Bench held that "a cause of staying the judgment ought to be always if it be upon a verdict at the Nisi Prius upon the *Postea* returned; and if it be upon verdict *in banco,* it ought to be made parcel of the record." In *Vicary v. Farthing,* Cro. Eliz. 411, "the matter being examined before Walmsley, Justice of Assize there (in the county of Devon), he returned the verdict and all this matter upon the *postea.*"

[15] The first case seems to have been *Goodman v. Cotherington* (Mich. Term, 16 Car. 11), 1 Sid. 235, where affidavits were read which showed that at the trial at Nisi Prius at Gloucester concerning a copyhold, one of the jurors after they had returned to consider their verdict, left the jury room and on his return brought with him a court roll and said he knew all about the matter and was for the plaintiff. The remainder of the jury who had theretofore been for the defendant gave way to this juror and found for the plaintiff: "Le Court pur cel miscarriage agard novel trial" Twisden, J., dissenting, for as the report runs "Mes Twisden, Justice, dit que in case de tiel miscarriage in pais nul notice serra pris de ceo sur affidavits sinon que suit indors sur le postea"; and he cited rather recent authorities to that effect.

The practice of proof by affidavit has ever since been followed—even Mr. Justice Twisden agreeing to that course, as we find him concurring with the remainder of the court (Hale, C. J., and Wylde, J.) in granting a new trial in a case in which affidavit-proof was given that the "jury cast lots for their verdict, and gave it as the lot fell." *Rex v. Fitz-Walter* (Trin. Term, 27 Car. 11) 2 Lev. 139; Cf. 3 Keble, 459, 465, 485, 519, 555, from which it appears that the jury stood six to six and "agreed to cast cross and pile"; *i. e.,* head and tail.

[16] *E. g.,* in *Gay v. Cross* (Trin. Term, 1 Anne) 7 Mod. 37, case 43, the court would not grant a new trial after a trial at Bar although the jury was recalcitrant and found a general verdict when directed to find specially "they would give no reason for it nor be moved to depart from it"; cf. Holt 603; 2 Salk. 750.

But in *Musgrave v. Nevinson* (Easter Term Geo. II) 1 Str. 584; cf. 2 Ld. Raym. 1358, it was held that "since the case of *Bewdley,* and another of *Sir Joseph Tyley v. Roberts in C. B.*" a new trial might be granted after a trial at Bar.

In *Smith d. Dormer v. Parkhurst* (Hil. Term, Geo. II), the objection was raised but overruled. Occasionally the objection would again be raised, but always met as it was by Lord Mansfield in *Bright v. Eynon* (1757) 1 Burr. 390, at page 395, of "late years new trials have been

The application for a new trial, however, was not made to the court sitting for the trial of a case or cases at Bar, but to the court sitting in term, *en banc,* precisely as applications were made for a new trial after a trial at Nisi Prius.[17]

It must, I think, be admitted that Blackstone is quite accurate in saying "if any defect of justice happened at the trial by surprise, inadvertence or misconduct, the party may have relief *in the court above* by obtaining a new trial.[18]

We now come to criminal cases. We have seen that an Assize judge went down to the court with five commissions. We have already spoken of those of Assize and Nisi Prius, the Civil Commissions; the commissions enabling him to try criminal cases were those of Oyer and Terminer and of General Gaol Delivery.[19] The Commission of Oyer and Terminer enabled the

granted not only after trials at Nisi Prius, but also after trials at bar. And it is at least equally reasonable to do it after trials at bar as after trials at Nisi Prius or indeed rather more so as the latter must be done upon what actually and personally appeared to a single judge whereas the former is grounded upon what must have manifestly and fully appeared to the whole court." And the rule he follows, is to grant a new trial when necessary for "doing justice to the party," or in other words, "attaining the justice of the case," following Lord Parker in *Reg. v. Helton,* Hil. Term, 12 Ann., B. R.

[17] See Tidd, *Practice,* c. 38. Tidd, it will be remembered, was Uriah Heap's favorite author; he has, however, received the commendation of those whose opinion was of distinctly greater value.

"I am improving my legal knowledge, Master Copperfield," said Uriah, "I am going through Tidd's Practice. Oh what a writer Mr. Tidd is, Master Copperfield."—Dickens, *David Copperfield.*

"My truly learned friend, the late Mr. Tidd, the author of one of the very best books in the profession, most logically contrived and arranged, and which I must say in justice to the memory of that most industrious and remarkable man,—one of the greatest benefactors to the profession—is next to Comyn's Digest, the most perfect model of clear and logical arrangement, to be recommended to every student as well as to every author in the law and which is in addition one of the very few books in which you never look for what you want without finding it. Mr. Tidd gives with his usual accuracy, etc., etc." Lord Brougham in *Earl of Glasgow v. Hurlet Alum Co.* (1850) 3 H. L. Ca. 25, at page 50; see also *In re Aaron Erb* (No. 2) 16 O. L. R. 597, at page 599, *per* Riddell, J.

[18] Blackstone, *Comm.,* Vol. III, p. 386. Of course when the trial was of an issue sent down from the court of Chancery, it was for that court to order another trial if not satisfied with the result. Story, *Equity Jurisprudence,* sec. 1479; *Ansdell v. Ansdell* (1840) 4 Myl. & Cr. 449, 450.

[19] Instances have been known both in England and in Canada of special commissions of Oyer and Terminer and Gaol Delivery, where the com-

judge to try indictments found before himself; that of Gaol Delivery to try every one found in the gaol he was to deliver, when he arrived at the circuit town whenever and wherever the prisoner may have been indicted, and for whatever crime committed to gaol.

It is quite certain that the commissioners of Oyer and Terminer and Gaol Delivery had no power to grant a new trial. In cases of felony there was no power anywhere to grant a new trial;[20] and even in cases of misdemeanour a new trial would not be granted where the defendant was acquitted, except in certain *quasi-civil* cases.[21]

But in the ordinary case of a misdemeanour, if it were to be

mission is confined to particular cases; indeed it seems probable that special occasions were the original cause of the commission of Oyer and Terminer; but these special commissions were rare at least except in very early times. Stephen in his *History of the Criminal Law,* Vol. I, pp. 107 *seq.,* mentions some in England; the "Biddulph murder cases" were tried under a special commission in Ontario; see also Blackstone, *Comm.* III, 271. Commissions of General Gaol Delivery go back beyond 1299 (Justices "assignatos ad deliberandum gaolas" are mentioned in the record of the Eyre for Gloucester for 1221—see Maitland, *Pleas of the Crown for 1221,* p. 88) and they are mentioned in 27 Edw. I. c. 3. They are provided for in 1328, 2 Edw. III. c. 2; Oyer and Terminer are mentioned in (1285) 13 Edw. I. c. 29; both were put on a satisfactory footing in 1328, 2 Edw. III. c. 2.

It is not worth while to discuss the old commissions of Trailbaston issued by Edward I and some of his successors. They are spoken of in Stephen, *Hist. Crim. Law,* Vol. I, pp. 110, 111 (where the form of such a commission is given in Norman-French) and have been long effete. Pike, *History of Crime,* Vol. I, pp. 221, 222, 223, 469, 470; Vol. II, 250, may also be referred to.

[20] In one case, *R. v. Scaife* (1851) 17 A. & E., N. S. 238, the court of Queen's Bench did make an order for a new trial at the instance of a prisoner, who had been convicted of robbery at the York Assizes before Cresswell, J. No precedent for such an order was cited or can be found, and the case is disapproved in the judicial committee of the Privy Council in *Attorney General, N. S. W. v. Bertrand,* 1867, L. R. 1 P. C. 520; S. C. 16 L. T. N. S. 752, where the law is carefully considered. See also *Rex. v. Inhabitants of Oxford,* 13 East, 410, 415, note, in which it is said that there is no instance of a new trial being granted in a capital case. In this case are collected all the authorities up to that time.

[21] *E. g.,* in *Quo Warranto.* In cases of indictment for non-repair of a highway sometimes the court would stay the entry of judgment so as to prevent a plea of *autrefois acquit* and to enable the parties to have the matter reconsidered. See Tidd, *Practice,* Vol. II, pp. 942, 943, where the authorities are collected.

tried at the Assizes and it were desired to have the chance of applying for a new trial, an application must be made to the King's Bench for certiorari before the case came on to be tried. If a certiorari was granted, the court might have the trial before the court itself at Westminster or send it down as a Nisi Prius record to the Assizes. In case of a conviction, a motion could be made to the King's Bench in term for a rule to show cause why a new trial should not be granted. The same practice was followed in trials at Bar and at Nisi Prius.

It must not be forgotten that at the common law, a very great many offences were tried at the Quarter Sessions; the same practice must be followed there as at Oyer and Terminer and Gaol Delivery if it were desired to have a new trial granted by the Court of King's Bench.[22] The Quarter Sessions had no power to grant a new trial in the proper sense of the term; but like the court of Oyer and Terminer, &c., might discharge a jury before verdict and swear a new jury; or if there were such irregularity in the proceedings (not affecting the merits) as amounted "to a mistrial as cases of defects of jurisdiction, or cases of verdict so imperfect or so insufficiently worded, or so ambiguous or inconsistent that no judgment could be founded thereon," the court of trial might cause a trial to be had in place of the abortive proceeding which was not really in law a trial at all.[23]

In many cases the trial tribunal, where the result seemed wrong,

[22] Chitty, *Criminal Law,* Vol. I, pp. 652, *sqq.* Stephen, *Hist. Criminal Law,* Vol. I, pp. 310, 311, where all the cases are collected; also Tidd, *Practice,* Vol. II, 943.

I do not say anything about motions in arrest of judgment, as these, if successful, simply did away with the indictment, etc., as though it never existed, and left the defendant liable to another prosecution; not to another trial on the same indictment.

[23] The quotation is from Russell, *Crimes and Misdemeanors* (7th Ed. 1909), Vol. II, p. 2006. Amongst other cases cited is *Dreyer v. Illinois,* 187 U. S. 71. On page 2005, the author says: "Motions for a new trial have never been allowed except in criminal cases tried on a record of the Court of King's Bench (or the K. B. D.) in England and Ireland"; and cites Archbold, *Criminal Pleading* (23d. Ed.) 291, and many cases.

Chitty says, Vol. I, p. 654, that the first reported case in which a new trial was granted was in 1655; but that was *Wood v. Gunston,* Style 462, a civil case in slander already referred to.

On the same page he gives the technical distinction (which I have disregarded) between "a new trial" and a *"venire facias de novo."*

respited the execution, that the convict might apply for a pardon; often too the judge himself desired to discuss the matter with his brethren that he might make a representation to the Crown. As in most other instances, means were found to mitigate the rigour of the law and prevent avoidable injustice being done.[24]

It seems clear that in criminal as in civil cases, the trial Judge had not the power to grant a new trial, but that recourse must be had to "the Court above."

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[24] Sometimes this laudable desire on the part of the courts was frustrated by the conduct of the accused himself, as for example in the well-known case of *R. v. Oneby* (1827) 9 St. Tr. 14, 17 St. Tr. 766; Str. 766; 2 Ld. Raym. 1485. Major Oneby had an affray in a London tavern with William Gower, in which he killed Gower. He was indicted for murder at the Middlesex General Sessions, the indictment was taken into the court of Gaol Delivery for Newgate and the jury found a special verdict. Everyone was content to let the matter rest without judgment, but the Major got tired of lying in gaol and was confident of acquittal. He, therefore, after the lapse of more than a year, had the record removed into the King's Bench and demanded judgment. He got it. He was held guilty of murder and sentenced to be hanged. Failing to obtain mercy from King George II, "he killed himself in Newgate in the night before the day appointed for his execution by cutting through the great artery in his arm with a razor by which he bled to death."